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No. 96-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below violate the constitutionally guaranteed due process of law rights of the Pennsylvania petitioners by denying them access to Pennsylvania courts to pursue their remedies under Pennsylvania law for illegal marketing of insurance policies in Pennsylvania, and to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum?

2. Does the McCarran-Ferguson Act, which mandates application of the constitutional principle of state sovereignty to the insurance business, require the application of Pennsylvania law to lawsuits based on illegal marketing of insurance policies in Pennsylvania?

PARTIES TO THE PROCEEDING

The petitioners in this case are Ronald Coulter, Anissa Coulter, Tami Bazy, Michelle Blum, Shelley Daughenbaugh, Frieda Kamel, Patricia Frey, Joyce McCandless, Diana Johnson, Gerald DeArmitt, Ada DeArmitt, Angelo Recupero, Robert Hemcher, Thomas Rostek, JoAnn Rostek, Jennifer Marie Rostek, Nathan Bennett, Nathan Bennett, Jr., Pamela Gonder, Cory Gonder, Travis Gonder, Douglas Smith, Joseph Corriere, and Donna Corriere. All other parties to the instant proceeding are set forth in the caption on the cover of this petition.

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE APPEAL OF RONALD AND ANISSA COULTER et al.
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v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The movant parties respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinions of the Magistrate Judge (App. 54a, 68a, and 78a) and the United States District Court for the Western District of Pennsylvania (App. 38a, 44a, and 49a) are unreported. The denial orders of the United States Court of Appeals for the Third Circuit (App. 1a, 35a, 36a, and 37a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 16, 1996, and a timely petition for rehearing was denied on March 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASES

This proceeding involves the unhappy absurdity of being forced to go to Tampa, Florida to try Pennsylvania cases.

These cases have nothing to do with Florida.

The cases were brought by consumers residing in Pennsylvania who purchased illegally marketed insurance policies from Pennsylvania agents of defendant Metropolitan Life Insurance Company (Metropolitan).

This reductio ad absurdum is brought about by Metropolitan's continuing effort to seek absolution from its Congressionally mandated obligation to comply with the insurance regulatory laws of the several states, using the device of a somewhat hastily negotiated class action settlement characterized by highly questionable adequacy of representation.

The whole basis of these actions instituted in the courts below were events which occurred in Pennsylvania in violation of Pennsylvania statutory and common law.

Petitioners were among 436,547 Pennsylvania purchasers of life insurance products from Pennsylvania agents of Metropolitan during the period of 1991-1993. (App. 246a). They are among the millions of American consumers who purchase intangible personal property products such as stocks, bonds, and life insurance policies. Petitioners are all residents of Pennsylvania; all purchases were made in Pennsylvania; and all of the Metropolitan salesmen worked out of offices in Pennsylvania.

The life insurance products in question were being illegally marketed because they had been rejected by the Pennsylvania

Insurance Commission, but they were sold anyway in violation of the Pennsylvania Insurance Company Act of 1921, 40 P.S. 391 et seq.

Additionally, the Coulters alleged Metropolitan's Pennsylvania agents fraudulently misrepresented the life insurance products they were selling by claiming they conferred substantial financial benefits above and beyond mere life insurance benefits. They used misleading labels for their alleged plans and programs such as, "50/50 Savings Plan," "Retirement Plan," and "Savings Plan." In truth, they were only whole life insurance policies. Purchasers were given physical examinations and blood tests for the insurance coverage. However, the agents gave them false assurances that they would receive financial benefits above and beyond death benefits. These misrepresentations violated not only the Pennsylvania Unfair Insurance Practices Act, 40 P.S. 1171.1 et seq, but also the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201.1, et seq., and The Pennsylvania Bad Faith Insurance Statute, 42 Pa. C.S.A. § 8371.

The Pennsylvania Insurance Commission carried out a

market conduct survey and issued a report (App. 234a) finding Metropolitan in direct violation of Pennsylvania law.

The Pennsylvania Insurance Commission stated (App. 246a):

> In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477 b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

The Pennsylvania Insurance Commission also stated (App. 236a):

> The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions.

The various, separate Petitioners then brought four separate actions against Metropolitan for compensatory and punitive damages under Pennsylvania statutory and common law. These actions were filed in the Common Pleas Court of Allegheny

County, Pennsylvania and the United States District Court for theWestern District of Pennsylvania. Metropolitan had the state court actions removed to the Federal court on the basis of diversity of citizenship. The Coulters filed an Amended Class Action Complaint on August 16, 1994 (App. 138a).

On September 23, 1994, in the Coulter case, the Western District Court of Pennsylvania granted a Motion to Stay the proceedings in Coulter pending a ruling on a proposed settlement of a class action case pending in the United States District Court for the Middle District of Florida, Tampa Division, captioned **Horton v Metropolitan Life Insurance Company**, C.S.A. No. 93-1849-CIV-T-2316, **cert denied** sub nom **Ronald and Anissa Coulter, Petitioners v Horton et al. and Metropolitan Life Insurance Company**, No. 96-423. This case involves a plaintiff class defined by Metropolitan as all persons who made their purchases

> ...based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products...(App. 249a).

This definition emphatically excludes the instant petitionerssince Metropolitan's Pennsylvania agents, through their actions and statements, made abundantly clear that life insurance was an integral part of the plans they were selling. This was not done by the Florida Metropolitan agents.

Petitioners' exclusion from the settlement class was forcefully buttressed by the negotiated Proof of Claim form approved by the Tampa court (App. 257a). The Proof of Claim form was written to determine actual membership in the settlement class and required settlement class members, who sought to make a claim, to certify the truth of the following statements:

> A. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.
> B. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.
> C. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

If any of the instant petitioners certified that they did not understand they were buying a life insurance policy, it would be a

complete lie. The class definition and Proof of Claim form unmistakably make clear that petitioners are not members of the **Horton** settlement class, and prevents them from receiving any proceeds from the class settlement. Since their case was stayed because of the Horton case, the Coulters filed an intervention motion in Horton, which was denied.

After the **Horton** case had been settled, Metropolitan then filed Motions to Transfer the instant cases to the Tampa court. The negotiating parties and the Tampa court insisted that the petitioners were included in the settlement, even though two completely distinct patterns of deception were employed, one of them in total violation of Pennsylvania law with full disclosure that life insurance was being sold.

The Magistrate Judge in Pennsylvania recommended the 1404 (a) transfer. Despite the fact that petitioners are by clear definition not members of the plaintiff class in the Tampa settlement; that petitioners are not entitled to any benefits from the Tampa settlement because they cannot make the required certification that they did not understand they were purchasing life

insurance; and that all sources of proof, all parties and witnesses, and all events related to petitioners' claims for damages have a Pennsylvania situs; the Magistrate Judge recommended that the cases be transferred, finding that he was not qualified to review the actions of the Tampa Court (App. 54a, 68a, and 78a). The Plaintiffs filed objections to the Magistrate Judge's report and recommendation. The United States District Court for the Western District of Pennsylvania adopted the Magistrate Judge's opinion as its own (App. 38a, 44a, and 49a). These actions implemented amost grievous form of forum shopping.

Petitioners filed Petitions for a Writ of Mandamus with the United States Court of Appeals for the Third Circuit on December 18, 1996. The court denied the petitions without opinion on February 13, 1997. (App. 35a, 36a, and 37a). A petition for rehearing (App. 3a) was timely filed and was denied without opinion on March 12, 1997. (App. 1a).

ARGUMENT

A. THE COURTS BELOW VIOLATED THE CONSTITUTIONALLY GUARANTEED DUE PROCESS OF LAW RIGHTS OF THE PENNSYLVANIA PETITIONERS BY

DENYING THEM ACCESS TO PENNSYLVANIA COURTS TO PURSUE THEIR REMEDIES UNDER PENNSYLVANIA LAW FOR ILLEGAL MARKETING OF INSURANCE POLICIES IN PENNSYLVANIA, AND TO MAKE A COLLATERAL ATTACK ON THEIR WRONGFUL INCLUSION IN A CLASS ACTION SETTLEMENT IN A NON-PENNSYLVANIA FORUM

The courts below have taken the instant cases in which all events, witnesses, parties, and applicable laws are related to Pennsylvania -- and ordered that they be tried in Florida!

This incredible result compels review by this Court because it unconstitutionally denies access to Pennsylvania courts for the Pennsylvania petitioners to pursue their remedies under Pennsylvania law, and to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum.

To resolve a motion to transfer venue, a district court must weigh in the balance factors bearing on convenience and fairness, Gulf Oil Corp. v. Gilmore, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), including:

1. Plaintiff's choice of forum. In these cases, the forums chosen by the plaintiffs were the Court of Common Pleas of Allegheny County, Pennsylvania and the United States District

Court for the Western District of Pennsylvania.

2. The relative ease of access to sources of proof. In these cases, the sources of proof are all in Pennsylvania, including the Pennsylvania Insurance Commission; Metropolitan's Pennsylvania offices which have, or should have, the records of the illegal marketing transactions; Metropolitan's Pennsylvania agents or their successors; the purchasers of the illegally marketed life insurance products; and other records and witnesses of the illegal transactions; all located in Pennsylvania.

3. Availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses. In Pennsylvania, the problems of costs and compulsory process would be minimized; whereas, in Florida, they would be needlessly maximized by pointless transportation for more than one thousand miles.

4. Practical considerations which would make trial of a case easy, expeditious, and inexpensive. All practical considerations in the instant cases clearly indicate that the trial of the cases would be much more easy, expeditious, and inexpensive

in Pennsylvania rather than in Florida.

The overwhelming weight of authority is that a petition for a writ of mandamus is the proper procedure to challenge the granting of a motion to transfer, but the United States Circuit Court of Appeals for the Third Circuit declined to comment on petitioners' seeking of mandamus.

In Gulf Oil Corp., vs. Gilmore, this Court in 330 U.S. at page 508, stated:

> But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

In the same case, this Court also observed in 330 U.S. page 508, stated:

> But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. Certainly, to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.
>
> Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.
>
> There is an appropriateness, too, in having the trial

> of a diversity case in a forum that is at home with the state law that must govern the case, rather then having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

This Court, in Farens v John Deere Co., 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990), summarized the opinion in the case of Van Dusen v. Barrack, infra, as follows:

> The quoted part of Van Dusen reveals three independent reasons for our decision. First §1404(a) should not deprive parties of state law advantages that exist absent diversity jurisdiction. Second §1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under §1404(a) should turn on considerations of convenience and the interest of justice, rather then on the possible prejudice resulting from the change of law. Although commentators have questioned whether the scant legislative history of §1401(a) compels reliance on these three policies, See Note, Choice of Law 123 (1965), we find it prudent to consider them in deciding whether the rule in Van Dusen applies to transfers initiated by plaintiffs. We decide that, in addition to other considerations, these policies require a transferee forum to apply the law of the transferor court, regardless of who initiates the transfer. A transfer under §1404(a), in other words, does not change the law applicable to a diversity case.

It is provided in 28 U.S.C. §1404(a) that a district court

may "[f]or the convenience of parties and witnesses, in the interest of justice... transfer any civil action to any other district or division where it might have been brought." The purposes of §1404(a) are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.

The actions of the courts below in the instant cases can only cause the waste of time, energy, and money plus unnecessary inconvenience and expense. Review by this Court is compellingly needed to prevent further instances of such maladministration of the Federal judiciary system.

It must be noted that §1404(a) authorizes transfer of a civil action only to a district or division "where it might have been brought." From both a practical and legal standpoint, it is highly questionable that petitioners' civil actions "might have been brought" in Tampa, Florida.

The Magistrate Judge's decision was based upon his statement that "Rule 1404(a) is addressed to concerns of judicial economy." This is in direct contradiction to pronouncements by

this Court and numerous lower Federal courts that §1404(a) is addressed to concerns of fairness and convenience in the interest of justice.

The United States District Court for the Western District of Pennsylvania thus found it could not entertain a collateral attack on the class action rulings of a non-Pennsylvania court and therefore could not entertain the Pennsylvania Petitioners' civil actions.

The District Court adopted the Magistrate Judge's opinion as its own. The Courts below cited not one single decision of this Court to justify their closing of the doors of the Pennsylvania courts to the Pennsylvania Petitioners.

The Magistrate Judge's decision ignored the 1404(a) factors and was based on an incorrect assumption that the court which certified a plaintiff class in a Federal class action lawsuit is a superior forum to resolve issues related to that class certification. This assumption is completely contrary to recent judicial precedent. Class action settlements and class certifications have fallen into disrepute. In 1995-1996, the following cases overturned

nationwide class certifications in Federal class actions:

The Fifth Circuit Court of Appeals overturned a class certification and faulted the trial judge for failing to analyze specifically how variations in state laws would affect the predominance and superiority criteria required by Federal Rule of Civil Procedure 23. Castanea v American Tobacco Company, 84 F.3d 734 (5th Cir. 1996).

The Sixth Circuit Court of Appeals granted a mandamus petition and directed the district court to decertify the plaintiff class. The appellate court expressed the opinion that the district court was obligated to consider how the law of negligence differs from jurisdiction to jurisdiction. In re American Medical Systems, 75 F.3d 1069 (6th Cir. 1996).

The Seventh Circuit Court of Appeals granted a petition for mandamus and ordered the district court to decertify the class. One motivation for the decision to grant mandamus was the trial court's proposal to present to the jury an instruction on negligence applicable to all fifty states. Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

The Ninth Circuit Court of Appeals held that the district court must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. It was held that the certification order was brief and conclusory, as well as conditional, and failed to fully consider all the elements. Valentino v Carter Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996).

The Third Circuit Court of Appeals held that the criteria set forth in Rule 23 for judicial approval of Federal class action proceedings and certifications of plaintiff classes must be applied to settlements of such actions. Georgine v Amchem Products, Inc., 83 F.3d. 610 (3d Cir. 1996) cert granted sub nom. Amchem Products, Inc v Windsor, 65 USLW. 3338, November 1, 1996 (No. 96-270).

Any claim that the instant class action lawsuits are impacted by the class action lawsuit against Metropolitan in the Tampa, Florida District Court must be subjected to the principles set forth by this Court in Hansberry v Lee, 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940). as follows at 311 U.S. at 44, 45:

It is one thing to say that some members of a class

> may represent other members in a litigation where the sole and common interests of the class in the litigation is either to assert a common right or to challenge an asserted obligation. ... It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any of the others in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent; does not afford that protection to absent parties which due process requires.

The historic impact of this analysis was evidenced by the Third Circuit Court of Appeals in In Re Real Estate Title & Settlement Services Litigation, 869 F.2d 760 (1989) by stating that "Ever since Hansberry v Lee was decided in 1940 collateral attacks have been considered to be a necessary part of the class action scheme."

Because of the Stay Order in Pennsylvania, The Coulters sought to intervene in Tampa to protect their rights. The Tampa Court made no pretense that the interests of the Pennsylvania petitioners were being adequately represented. The Court

specifically stated that neither Pennsylvania law nor the law of any other state was being applied. (App. 132a). The Court denied that Attorney Behrend represented any Pennsylvanian because he had not been so designated by any court. (App. 124a). The latter assertion totally ignored the Pennsylvania petitioners' constitutional right to retain counsel of their own choice.

If the petitioners in the instant cases had been allowed to challenge the adequacy of their representation and the propriety of their inclusion in the Horton class, it is extremely probable they would have succeeded. The Tampa court, in depriving the Coulters' Motion to Intervene in the Horton case, made very clear that it did not consider these issues very seriously. In its Findings of Facts and Conclusions of Law of October 25, 1994, the Court stated (App. 128a):

> Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23a's requirements of commonality, typicality, and adequate representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements 'may be more easily satisfied in the settlement

> context than in the more complex litigation context.' ... (Emphasis original).

This holding by the Tampa court that Rule 23's requirements are more easily met in a settlement context than in a litigation context, is completely contrary to the holding of the Third Circuit Court of Appeals in the Georgine case that Rule 23's requirements must be applied in settlements of class action lawsuits as it is in litigated class action lawsuits. The Georgine case is presently before this Court, as previously referenced.

Federal class action lawsuits are governed by Federal Rule of Civil Procedure 23. Among the governing criteria for class action lawsuits set forth in Rule 23 are numerosity, typicality, commonality, predominance, and superiority.

The United States District Court in Tampa, Florida has no expertise as to the numerosity of those harmed by these violations of Pennsylvania law; as to the typicality of the movant parties or their commonality; as to the predominance of the issues; or as to the superiority of alternatives. It is inconceivable that the Tampa court provides any societal advantages over a Pennsylvania court

as the forum for these actions.

This is an issue of widespread national importance because hundreds of thousands of persons are being swept rightfully or wrongfully into the web of class certifications in the flood of class action lawsuits currently inundating the Federal judiciary system.

As a practical matter, these thousands of persons will be denied due process of law unless they can challenge collaterally, in a forum of their own choice, their wrongful inclusion in the Horton class.

The courts below, in the present cases, have violated petitioners' constitutional due process rights by denying them an opportunity to make a collateral attack on their wrongful inclusion in the Tampa settlement.

Alleged superior expertise of the court in another forum is not a justification for a transfer set forth in 28 U.S.C. 1404 (a). Transfer is based on fairness and convenience to parties and witnesses in the interest of justice; therefore, the decision to transfer was based on erroneous grounds, and results in serious burdens on the Plaintiffs of locating counsel, cost, time, energy and

difficulty to compel testimony.

Any attempt to apply Florida law or erroneously asserted Federal common law to cases involving illegal marketing of insurance policies in Pennsylvania would violate this Court's decision in Phillips Petroleum Co. v Shutts, 472 U.S. 797, 86 L.Ed. 2 628, 105 SCt. 2965.

In that case, this Court held that application of Kansas law to class actions involving oil and gas leases predominantly in other states was sufficiently arbitrary and unfair as to exceed constitutional limits.

These cases are also controlled by this Court's decision in Van Dusen v Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Where this Court reviewed the propriety of a motion to transfer certain cases from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts.

This Court held that, if the cases were transferred from the Pennsylvania court to the Massachusetts court, the Massachusetts court would be obliged to apply Pennsylvania law.

This Court further held that the United States District Court for the Eastern District of Pennsylvania had not taken this factor into account and therefore remanded the case to that court.

The exact same situation is presented in the instant cases. Neither the Magistrate Judge, the District Judge, nor the United States Circuit Court of Appeals for the Third Circuit gave any consideration at all to the fact that the Florida court would be obliged to apply Pennsylvania law to the instant cases.

Such failure to apply the precepts of this Court to the Motion to Transfer constitutes a violation of the constitutionally guaranteed due process of law rights of the petitioners and provides compelling grounds for this Court to remand these cases to the United States District Court for the Western District of Pennsylvania.

At 376 U.S. 642, this Court's opinion in the Van Dusen case stated:

> In addition, it has long been recognized that there is an appropriateness in having the trial of a diversity case in a forum that is at home with the State law that must govern the case rather than have a Court in some other forum untangle

problems in conflicts of law and in law foreign to itself.

In 1990, the following legislation was enacted in Pennsylvania:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> 1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> 2) Award punitive damages against the insurer.
> 3) Assess court costs and attorney fees against the insurer.

This legislation has become known as the Pennsylvania Bad Faith Insurance Statute, Act 1990, Feb. 7, P.L. 11, No. 6, effective July 1, 1990, 42 Pa. C.S.A. §8371.

The decision of this Court in Van Dusen v Barrack, supra, makes clear that this legislation would apply in the Tampa court. However, forcing Pennsylvania petitioners to seek their rights under this Pennsylvania law in a Tampa, Florida courtroom, in which this law is foreign, is violative of due process.

The instant cases are all lawsuits based on violations of

Pennsylvania law within the boundaries of the Commonwealth of Pennsylvania.

An outstanding case on the right to collaterally attack a class action judgment is In re Real Estate Title & Settlement Services Litigation, 869 F.2d 760 (3rd Cir. 1989) cert. denied sub nom. Chicago Title Ins. Co. v Tucson United School District, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed. 2d 44, (1989). This case held that an Arizona School Board had the right to challenge collaterally in a United States District Court in Arizona both the adequacy of their representation and their inclusion in the plaintiff class in a prior class action lawsuit in the United States District Court for the Eastern District of Pennsylvania.

The court said:

> An absent plaintiff is not subject to the burdens of distant forum litigation (thereby creating a violation of that individual's due process rights) where it is based on a class action settlement, so long as it can challenge the adequacy of representation in the forum of its choice. Id. at 769.

The probability that petitioners would prevail in a collateral attack on the adequacy of their representation in the Horton case

is heightened by further reference to the case of In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3rd Circuit 1995). In that case, the fact that the attorneys' fee and the class settlement were negotiated simultaneously was a significant factor in the decision to strike down the settlement. The court concluded that these simultaneous negotiations created a strong indication of a probability of a conflict of interest, that the settlement's provision for a large attorney's fee in light of what it felt was very little work were "factors which militate against the conclusion that the class' interests were sufficiently pursued." 55 F. 3d at 803. In the Horton case, class members received refunds of a few hundred to a few thousand dollars while the class attorneys received a simultaneously negotiated attorneys' fee of $2,750,000.00 for a settlement which occurred within five months from the filing of the action.

The Tampa court found that it had no need to resolve constitutional limits on the application of state choice-of-law principles, in Paragraph 53, of the Court's findings. This is

contrary to this Court's decision in **Van Dusen v Barrack**, supra; this Court's decision in **Erie Railroad Co. v Tompkins**, 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, (1938), and the McCarran-Ferguson Act, **infra**.

In **Erie**, this Court stated in 304 U.S. at 78:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Therefore, it appears that the Tampa Court's Findings of Fact and Conclusions of Law were based on confusion between a Federal Rule of Civil Procedure on the one hand with the Federal Constitution or an Act of Congress on the other.

It is thus extremely probable that a collateral attack by the petitioners on their wrongful inclusion in the **Horton** settlement class would have been successful if they had not been unconstitutionally denied access to Pennsylvania courts.

B. THE MCCARRAN-FERGUSON ACT, WHICH MANDATES APPLICATION OF THE CONSTITUTIONAL PRINCIPLE OF STATE

SOVEREIGNTY TO THE INSURANCE BUSINESS, REQUIRES THE APPLICATION OF PENNSYLVANIA LAW TO LAWSUITS BASED ON ILLEGAL MARKETING OF INSURANCE POLICIES IN PENNSYLVANIA

The Tampa Court certified a uniform nationwide class action (App. 249a), and issued a uniform nationwide injunction affecting the marketing of insurance policies (App. 113a). This violated the national policy declared by the McCarran-Ferguson Act, 15 U.S.C.A. 1011-1015, c.20, 59 Stat. 33, March 9, 1945, which provides that:

> The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

This is certainly a clear expression of the intent of Congress that wrongdoing by persons in the course of carrying on the business of insurance shall be subject to the State laws applicable to such wrongdoing. In the instant cases, the applicable State laws are the Pennsylvania Bad Faith Insurance Statute, the Pennsylvania Unfair Trade Practices and Consumer Protection Act, and the common law of Pennsylvania. Transfer of lawsuits based on these applicable

laws to a forum far distant from Pennsylvania is clearly in error and in violation of the constitutional principle of state sovereignty.

The McCarran-Ferguson Act emphatically declares a national policy that the insurance industry is subject to State laws and regulations, thus requiring the application of Pennsylvania law to lawsuits based on illegal marketing of insurance policies in Pennsylvania.

CONCLUSION

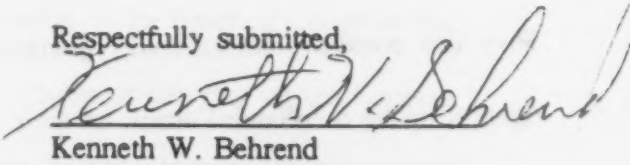
In conclusion, it is respectfully submitted that the Pennsylvania Petitioners possess constitutionally guaranteed due process of law rights to pursue their remedies in Pennsylvania courts for illegal marketing of insurance policies in Pennsylvania. They also possess constitutionally guaranteed due process of law rights to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum. These rights have been violated by decisions of the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit. The four hundred thousand unnamed putative plaintiff class members from Pennsylvania,

consumers of a multitude of tangible and intangible personal property products are susceptible of receiving the same or similar treatment unless this Court grants review.

These cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to vacate the order granting the motion to transfer; to vacate the order granting the stay of proceedings; and to proceed with consideration of the complaints. This would be a major contribution to better administration of justice within the Federal judiciary system.

Denial of review would allow forum shopping in its most grievous form to go unrebuked.

Respectfully submitted,



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